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Supreme Court, U.S.
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JUL 5 1979

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-20

FLAT GLASS ASSOCIATION OF JAPAN, *et al.*,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

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July 5, 1979

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Petitioners Flat Glass Association of Japan, *et al.*¹ respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia, entered January 31, 1979, affirming in part a safety standard promulgated by the Consumer Product Safety Commission ("CPSC").

¹ This petition is filed on behalf of the Flat Glass Association of Japan, Orient Glass, Inc., Sentinel Enterprises, Inc., Mitsubishi International Corporation, Seaply Glass Corporation, Construction Imports, Inc., Glasrep, and Glass International, Inc.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 593 F.2d 1323, appears as Appendix A, together with the Court's order of April 6, 1979, denying the petition for rehearing. The order of the CPSC, dated January 3, 1977, is published at 42 Fed. Reg. 1427 *et seq.* (January 6, 1977). That Federal Register notice appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals (Appendix A) was entered January 31, 1979. A timely petition for rehearing was denied April 6, 1979. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals for the District of Columbia Circuit properly sustain the Consumer Product Safety Commission's jurisdiction to promulgate a "consumer product" safety standard for a distinct building material not purchased by or for the personal use of consumers based on court-supplied factual inferences in lieu of agency-articulated findings exhibiting reasoned decision-making?

2. Did the Court of Appeals misinterpret section 9 of the Consumer Product Safety Act, 15 U.S.C. § 2058, when it affirmed a safety standard the Consumer Product Safety Commission promulgated without conducting a risk/benefit analysis to determine whether the "consumer product" presents an unreasonable risk which the safety requirements of the standard are reasonably designed to reduce or eliminate?

STATUTORY PROVISIONS INVOLVED

Sections 3(a), 7, 9, and 11 of the Consumer Product Safety Act, as amended ("CPSA"), 15 U.S.C. §§ 2052 (a), 2056, 2058, and 2060, are involved. The text of these statutory provisions as pertinent appears as Appendix C.

STATEMENT OF THE CASE

In January 1977, the Consumer Product Safety Commission promulgated a mandatory safety standard for architectural glazing materials following a rule-making proceeding under section 7 of the CPSA, 15 U.S.C. § 2056. The safety standard, codified at 16 C.F.R. Part 1201, prescribes impact performance standards for all types of glass intended for installation in six named components ("architectural products") of residential, commercial, school, and public buildings. See 593 F.2d at 1326 (App. A at A4-A5). Only glass certified as complying with the safety criteria may be installed in the six building components.

Wired glass, universally recognized and widely used since the Civil War as a reliable safety glazing material for architectural applications,² can not meet the new safety tests prescribed in the CPSC standard. It faces expulsion from the marketplace, driving manufacturers and distributors out of the business.³ Wired glass manufacturers instituted a proceeding in the Court of Appeals, invoking federal jurisdiction pursuant to 15 U.S.C. § 2060, to set aside the CPSC order. Petitioners challenged the CPSC's jurisdiction over wired glass, a build-

² Approximately 100,000,000 square feet have been installed in the past ten years.

³ A court-ordered stay postponed the demise of the wired glass industry pending the outcome of the lower court review. The Court of Appeals has not acted upon petitioners' request for stay of its mandate pending this Court's disposition of the petition for certiorari, although the mandate has not issued.

ing material, and the CPSC's lack of statutory findings mandated as a condition precedent to issuing the safety standard.

The CPSC has exercised its jurisdiction by issuing a safety standard for a non-residential building component that can not be purchased or used by consumers. Congress confined the CPSC to promulgating safety standards for "consumer products" only, 15 U.S.C. § 2056(a), and defined "consumer product" as any article, or component part of an article, produced or distributed for sale to or personal use of a consumer in or around a house, a school, in recreation, or otherwise. Specifically excluded as a "consumer product" is any article "not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer." 15 U.S.C. § 2052(a)(1). The Court of Appeals, citing its contemporaneous decision in a companion case, *CPSC v. Anaconda Co.*, 593 F.2d 1314 (D.C. Cir. 1979), ruled on review that "customarily" in the context of the statutory exclusion means more than occasionally and requires a jurisdictional showing that there is "... a significant marketing of the product . . . for sale to consumers or for the use of consumers. . . ." 593 F.2d at 1328 (App. A at A8).

Neither the standard nor the CPSC order promulgating the standard contains jurisdictional findings. Whether wired glass or architectural glazing materials generally are significantly marketed for sale to or use of consumers is not evident from the four corners of the standard or the CPSC's published preamble to the standard.⁴

⁴ The CPSC made only general statutory findings that the six architectural products into which glazing materials are incorporated are consumer products. 42 Fed. Reg. 1440 (App. B at B63). It made no findings, however, as to whether such glazing materials generally or wired glass specifically are marketed significantly to or for the use of consumers as distinct articles of commerce.

The Court of Appeals overlooked the lack of jurisdictional findings. It noted only that, in its view, the record substantiates the products covered by the standard are customarily marketed for sale to or the use of consumers, citing pages of a preliminary report by an outside consulting firm under contract to the CPSC that does not even discuss marketing of wired glass.⁵ 593 F.2d at 1328, n. 18 (App. A at A8).

Congress directed the CPSC to make specific findings in all standards with respect to the nature of the risk of injury the standard is designed to eliminate or reduce and "the approximate number of consumer products, or types or classes thereof, subject to such rule. . . ." 15 U.S.C. § 2058(c)(1). The CPSC must also find that each safety requirement in the standard is "reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product." 15 U.S.C. § 2058(c)(2).

The CPSC glass standard identifies the risks of injury the safety requirements are intended to reduce or eliminate: Lacerations resulting from walking or running into the glass, mistaking it for a door because the glazing is not visible; and lacerations resulting from accidentally falling into or through the glass. See 42 Fed. Reg. 1428, 1442 (1977) (App. B at B2-B3, B70). The standard

⁵ The Court of Appeals relies on a report entitled "Preliminary Industry Profile" prepared by Battelle Columbus Laboratories. The CPSC in its order makes no reference to this preliminary report. The pages cited, moreover, give only an overview of the glass industry's general channels of distribution. It contains no reference, explicit or implicit, to wired glass or to any role consumers may play in the sale or distribution of architectural glazing materials generally. In contrast, Battelle's *final* report, also of record (as pertinent, JDA. at 218-19), describes wired glass distribution as falling into three separate categories, each of which involves direct marketing between manufacturers or commercial outlets and either professional contract glaziers or industrial fabricators. None is sold to consumers, directly or indirectly.

purports to reduce or eliminate the risks by requiring glass installed in the six building components to break in an acceptable pattern when impacted with either 400 or 150 foot-pounds of kinetic energy, depending upon whether, in the CPSC's judgment, the glass size and location is likely to expose the consumer to a full-body contact.⁶

The CPSC, in compliance with 15 U.S.C. § 2058(c) (1), determined that wired glass is a separate, identifiable class or type of glazing material. It declined, however, to include in the standard any test criterion or other means of measuring or giving recognition to the deterrent effect on injuries of visual barriers or warnings, such as the wire mesh construction of wired glass, incorporated into glass installations. It concluded that wired glass can not meet either of the prescribed impact tests for safety in the standard and thus will be eliminated from the glazing market. In so doing, it failed to make findings, although required by 15 U.S.C. § 2058(c) (2), that compliance of wired glass with the impact requirements of the standard is reasonably necessary to reduce or eliminate an unreasonable risk of injury associated with that type of glazing material. It refused to evaluate the unique inherent safety feature of wired glass—its highly visible wire construction—as a means of reducing risks and ignored the absence of any relevant injury data to suggest an unreasonable risk exists.⁷ No tests were con-

⁶ The acceptable break pattern for wired glass requires the opening or hole in the glass, caused by the force of the test impactor (a 100-pound, shot-filled punching bag), to be so small the glass test specimen, in a horizontal position, will support a three-inch diameter four-pound steel ball placed on the opening.

⁷ Curiously, it analyzed other separate types of glazing materials to determine whether their special characteristics warranted exemption from the standard's requirements. See 593 F.2d at 1331, n.30 (App. A at A14); and 42 Fed. Reg. 1431-33, and 1435-36 (1977) (App. B at B16-B19, B21-B22, B24-B26, and B-40).

ducted to determine whether consumers are likely to impact wired glass installed in architectural products covered by the standard, given its wire mesh construction, or if an impact occurs, whether they are likely to be injured. Instead, the CPSC combed its files and bank of systematically collected injury data for evidence of a risk of injury associated with wired glass. It could turn up only one recorded wired glass injury since 1972 that it attributed to a risk of injury the CPSC's standard is designed to reduce or eliminate.⁸

On review, the Court of Appeals recognized that the unique physical properties and functions of wired glass separate it from the general class of glazing materials. Wired glass is, the Court observed, the only known transparent building material with qualified fire-retardant properties essential to meeting fire codes and contains a highly visible, permanently-bonded wire mesh construction that acts as a visual warning or barrier to unsuspecting consumers coming in contact with the glass. 593 F.2d at 1327, 1331-33 (App. A at A5, A15-A16, A18-A19). The Court agreed these unique features required the CPSC to accord that material special consideration. The Court thus ordered the CPSC on remand to re-evaluate subjecting wired glass to the standard's requirements, but only with regard to that material when installed as a fire barrier in compliance with fire codes and in large glass panels more than 48 inches from an entrance or exit door (a "non-adjacent panel").

The Court declined to order the CPSC to evaluate the effectiveness of the same unique features in reducing risks of injury associated with wired glass installed in other building locations, particularly in entrance/exit

⁸ See JA. 121-39, 168-205, 214-220, 241, 244, 272-73; JDA 245. This paucity of data led the CPSC's Bureau of Epidemiology to concede the evidentiary basis was lacking to subject wired glass to the standard. JA. 273.

doors and glass panels adjacent to such doors. The Court inferred from the CPSC decision that the CPSC had concluded visual barriers are effective risk-of-injury preventers only in non-adjacent glass panels." On the contrary, however, the CPSC itself failed to assess the effectiveness of visual barriers in connection with any type of glazing material installed in any of the six building components (other than large, non-adjacent glass panels) and specifically refused to evaluate the inherent visual warning effect of wired glass installed in *any* architectural product.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OBVIATES CPSC'S DUTY TO MAKE JURISDICTIONAL FINDINGS AND MARSHALL FACTS TO SUPPORT EXERCISE OF THAT JURISDICTION

The District of Columbia Circuit's opinion opens up a significant problem as to the efficacy of federal courts supplying jurisdictional findings not appearing in or otherwise apparent from CPSC orders under review. With other safety standards in various stages of promulgation, this Court should clearly delineate the appellate court's function in construing the statutory power of the CPSC and, in so doing, deter the jurisdictional overreach of the CPSC in subsequent rule-making proceedings.

The statute empowers the CPSC to regulate only "consumer products." It carefully carves out from the definition those products not customarily marketed for sale

⁹ The Court relied on the CPSC's decision to exempt non-adjacent glass panels from the standard when a bar or chair rail is fastened horizontally across the glass two to three feet above the floor. It found no other CPSC consideration of visual barriers in the standard. 593 F.2d at 1332-33 (App. A at A16-A18).

to or the personal use of consumers as distinct articles of commerce. The Court of Appeals has made the issue of CPSC jurisdiction to promulgate a safety standard for architectural wired glass, a distinct class of glazing materials, turn on the factual determination of pertinent marketing practices. The CPSC itself never addressed this issue, let alone reached the type of determination the Court has deemed controlling here. The Court, ignoring the crucial administrative void, has supplied its own findings, substituting its judgment for that of the CPSC. It concluded without explanation that the record substantiates that "the products covered by the safety standard are customarily marketed as distinct articles of commerce for sale to or for the use of consumers. . . ." 593 F.2d at 1328 (App. A at A8).¹⁰

The same Court of Appeals likewise held in *CPSC v. Anaconda, supra*, that marketing practices, ruled determinative of CPSC jurisdiction to issue an adjudicatory order for aluminum branch circuit wiring systems, must be decided first by the CPSC, which has the burden of proof on the issue of jurisdictional facts. The Court of Appeals remanded the case to the lower court for determining whether the CPSC had in the first instance made such findings and, if not, for referral back to the CPSC to carry out this task. 593 F.2d at 1322. The Court's action in these two cases is patently inconsistent.

Judicial usurpation of the administrative jurisdictional fact-finding function sets dangerous precedent especially

¹⁰ The significance of evidence to discern marketing practices emanates from the Court's holding in *CPSC v. Anaconda, supra*, that Congress did not intend the CPSC to regulate housing or all components of housing. Rather, Congress created only a limited federal role in the area of building construction so extensively regulated by local building codes. 593 F.2d at 1320. Thus, the *Anaconda* court ruled, only those housing components significantly marketed to consumers as distinct articles of commerce and apart from the purchase of the building itself could be regulated by the CPSC as "consumer products." 593 F.2d at 1321-22.

for review of orders from a federal agency bent on maximizing its self-proclaimed jurisdictional powers at the expense of congressional intent and the traditional role of local building codes in regulating construction. The CPSC's jurisdictional argument advanced in *Anaconda* demonstrates the necessity for holding the CPSC to its statutory obligation of making findings on the issue of jurisdiction over "consumer products" covered by its standard and developing facts in the record to support such findings. The *Anaconda* court sounded a note of alarm in paraphrasing the CPSC's unbridled interpretation of its jurisdiction over building materials and components:

[T]he Commission has taken the position that its jurisdiction extends to every component part of a dwelling including the central wiring and plumbing systems as well as the wall and flooring systems and various building components.

593 F.2d at 1320.¹¹

The Court rejected this expansive interpretation as inimical to congressional intent and the delicate balance of federal/state regulation.

The threat of an unlimited reach of CPSC jurisdiction over building components, if left unchecked, is real and imminent: A rule-making proceeding to develop consumer product safety standards for aluminum wiring systems is in the formative stages;¹² the CPSC has established a special department within the agency, titled "Household Structural Products," to deal with these and other building materials; and the data collection system of the CPSC has been re-programmed with a special category, "Home Structures and Construction Materials," to col-

¹¹ See also 593 F.2d at 1321, n.20.

¹² The Court of Appeals in *Anaconda* specifically declined to rule on whether aluminum wiring systems are "consumer products" for this purpose. 593 F.2d at 1322, n. 27.

lect injury information to support rule-making proceedings involving such "products."

A decision from this Court on the key issue of determining jurisdiction—whether the CPSC itself must specifically find the "consumer products" it proposes to regulate with a safety standard are marketed to consumers or whether the appellate court may supply these findings—is not only necessary to clarify the role of federal reviewing courts, but also to eliminate the prospect of vitiating protracted, expensive CPSC rule-making proceedings by subsequent judicial litigation of this issue.

The lower court's intrusion into the administrative jurisdictional fact-finding process sounds the knell for the wired glass industry. The CPSC has issued a standard wired glass can not possibly meet. Jurisdiction to issue the standard hinges on the factual question of marketing practices. The Court of Appeals has simply assumed without justification that wired glass is significantly marketed to consumers. The Court is plainly wrong. The record itself so demonstrates. The only evidence bearing on the issue establishes conclusively that wired glass is not sold or otherwise distributed to consumers. JDA at 218-19. See *supra* at n.5.

II

THE DECISION CONFLICTS IN PRINCIPLE WITH RECENT DECISIONS OF THE FIFTH AND FIRST CIRCUITS AS TO THE PROPER INTERPRETATION OF 15 U.S.C. § 2058

Section 9(c)(2) of the CPSA, 15 U.S.C. § 2058(c)(2), provides that the CPSC may not promulgate a safety standard unless it finds the requirements of the standard are "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product." Three recent Courts of Appeals decisions have interpreted

this provision (one, an OSHA provision deemed identical), reaching the same conclusion regarding CPSC's burden to assess the nature of the risk and the reasonableness of the safety requirements. This conclusion conflicts with the treatment the District of Columbia Circuit has accorded the same section of the CPSC in this proceeding.¹³

The Fifth Circuit in *Aqua Slide* held the CPSC must demonstrate by substantial evidence that each requirement in its safety standard is reasonably necessary to eliminate or reduce an unreasonable risk of injury and conversely that an unreasonable risk of injury is associated with each product which the standard seeks to eliminate or reduce. The *Aqua Slide* court expressed the relationship between "unreasonable risk" and "reasonably necessary" as follows:

The necessity for the standard depends upon the nature of the risk, and the reasonableness of the risk is a function of the burden a standard would impose on a user of the product.

569 F.2d at 839.

The Fifth Circuit recognized the reasonableness of the identified risk, and thus the necessity for the standard, is directly related to the remoteness of the risk. 569 F.2d at 840. The First Circuit in *D. D. Bean* expanded upon this connection, finding that the statutory term "unreasonable risk" contemplates only real, not speculative, risks and only risks that are appreciable and unnecessary. On this issue, the First Circuit stated the CPSC must bear the burden of "demonstrating the existence

¹³ The three conflicting decisions are *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831 (5th Cir. 1978); *D. D. Bean & Sons v. CPSC*, 574 F.2d 643 (1st Cir. 1978); and *American Petroleum Institute v. OSHA*, 581 F.2d 493 (5th Cir. 1978), *petition for cert. granted*, Feb. 21, 1979, — U.S. — (1979) (Nos. 911 and 1036, 1978 Term). The First and Fifth Circuits in *D. D. Bean* and *American Petroleum*, respectively, cite and rely heavily on *Aqua Slide*.

of such a risk before proceeding to regulate." 574 F.2d at 650-51, citing *Aqua Slide* and the legislative history of the CPSC. Similarly, in *American Petroleum*, the Fifth Circuit held that OSHA must demonstrate the asserted reality of the identified risk has some factual basis bottomed on substantial evidence. 581 F.2d at 505.¹⁴

Thus, under the principles of *Aqua Slide*, *D. D. Bean*, and *American Petroleum*, whether impact tests banning wired glass are reasonably necessary depends upon the likelihood of lacerative injury resulting from consumer contact with wired glass installed in doors and panels. In evaluating the likelihood of injury, and thus the reasonableness of the risk, the wire mesh construction of the glass and its history of injury-free use must be taken into account, as well as the fact compliance with the standard will force wired glass from the marketplace, leaving the public without a fire-retardant glazing material and with only plastics to meet the need for expeditious replacement of broken glass.

The Court of Appeals' decision is in irreconcilable conflict with these principles. It does not inquire whether the CPSC, in subjecting wired glass to the standard's impact criteria, conducted a risk/benefit balancing test. It declined to inquire whether the CPSC attempted to measure the remoteness of risk of injury associated with wired glass. Had the Court conducted such review, it would have discovered the CPSC never assessed the risk

¹⁴ While *American Petroleum* involved review of an OSHA standard, the Court there relied on its prior holding in *Aqua Slide*, equating the statutory duties of OSHA and CPSC to conduct risk analyses to determine the reasonableness of the safety requirements vis-à-vis the nature of the risks of injury the requirements seek to reduce. Petitioners understand the Fifth Circuit's disposition of the risk analysis requirement is a principal ground urged for granting the petitions to this Court to issue a writ of certiorari in the *American Petroleum* case. The petitions were granted February 21, 1979, and opening briefs have been filed.

of injury associated with wired glass, separate and apart from glazing materials generally, installed in any covered architectural product. It would have found the CPSC never questioned, with regard to any architectural product, whether permanently affixed visual warnings sufficiently reduce risks associated with wired glass (or any other type of glazing material) to the point the remaining risk may no longer be deemed "unreasonable."¹⁵ In failing to follow *D. D. Bean*, the Court had to speculate that the CPSC did consider and consciously rejected the effectiveness of visual warnings in reducing injuries associated with adjacent glazed panels and the other five architectural products covered by the standard. In fact, however, the CPSC has never given the issue any such consideration, at least at the time the standard was promulgated.¹⁶

¹⁵ No record evidence will support such determination. Despite its best efforts, the CPSC could not find any supportive injury data for wired glass and could not marshal any other empirical data to establish consumers are likely accidentally to impact wired glass installed in doors and adjacent panels with sufficient force to break the glass and incur the type of injury the standard is designed to eliminate. Lack of significant injury data or other empirical evidence in *D. D. Bean* deprived the standard's delay ignition requirement of the substantial evidence necessary to sustain its promulgation. The Court was unable to find the risk was appreciable. 574 F.2d at 650.

¹⁶ Subsequent CPSC action, brought to the Court of Appeals' attention in filings with the petition for rehearing and accepted into the record by order of that Court (App. A at A28) did recognize the effectiveness of visual warnings in other glazed architectural products—of stained and patterned glass installed in doors and adjacent panels, 43 Fed. Reg. 57254 (1978), and of horizontal chair rails fastened across clear glazed panels adjacent to doors, 44 Fed. Reg. 31221 (1979).

CONCLUSION

For the foregoing reasons, petitioners, Flat Glass Association of Japan *et al.*, respectfully request this Court to issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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